

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
(Cameron Park, California)

HEMINGTON LANDSCAPE SERVICES, INC. 1/

Employer

and

UA LOCAL 355, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPEFITTING INDUSTRY, AFL-CIO; and
OPERATING ENGINEERS LOCAL UNION NO. 3,
INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO 2/

Joint-Petitioners

20-RC-17531

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 4/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 5/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 6/

All full-time and regular part-time production and maintenance employees, including foremen, general foremen, equipment operators, plumbers, pipe fitters, landscape and irrigation workers, mechanics, and mechanics' helpers employed by the Employer at its Cameron Park, California location; excluding office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION 6/

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

OVER

period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **UA Local 355, United Association Of Journeymen and Apprentices Of the Plumbing and Pipefitting Industry, AFL-CIO; and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before **July 28, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by **August 4, 1999**.

Dated July 21, 1999

at San Francisco, California

/s/ Robert H. Miller
Regional Director, Region 20

- 1/ The Employer's name is in accord with the stipulation of the parties.
- 2/ The Joint Petitioners' names appear in accord with the stipulation of the parties.
- 3/ The parties stipulated, and I find, that the Employer is a California corporation with an office and place of business in Sacramento, California, where it is engaged as a landscaping contractor in the construction industry performing primarily commercial and industrial landscaping. The parties further stipulated, and I find, that during the calendar year ending December 31, 1998, the Employer, in the course and conduct of its business operations, provided services valued in excess of \$50,000 to various land development and construction enterprises, each of which is directly engaged in interstate commerce. Based on the parties' stipulation to such facts, it is concluded that the Employer is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.
- 4/ The parties stipulated, and I find, that the Joint Petitioners are each a labor organization within the meaning of the Act.
- 5/ The parties stipulated, and I find, that there is no contract bar to this proceeding.
- 6/ The Joint Petitioners seek to represent a unit comprised of all full-time and regular part-time production and maintenance employees, including foremen, general foremen, equipment operators, plumbers, pipe fitters, and landscape and irrigation workers employed by the Employer; excluding office clericals, guards and supervisors as defined in the Act. The Joint Petitioners would exclude General Foreman Dale Schumacher from the unit on the basis that he is a statutory supervisor. The Employer asserts that all of the foremen and general foremen are statutory supervisors and should be excluded from the unit. The Employer also contends that the mechanic and mechanic's helper should be included in the unit. At the hearing, the Joint Petitioners asserted that the mechanic is a statutory supervisor who should be excluded from the unit and that the mechanic's helper should be included in the unit. However, the Joint Petitioners did not address these issues in their post-hearing brief.

Background. The Employer has been in business for about 17 years, providing commercial landscaping services in Northern California and Nevada primarily on new construction projects, including those for apartment complexes, shopping centers, production facilities, industrial facilities and office buildings. The Employer's president, Mark Hemington, testified that the Employer is headed by himself and his wife, who does the Employer's accounting work. Hemington and his wife are the only salaried persons employed by the Employer. Hemington does the estimating work for the Employer with the help of office employee Sheila McVey.

The record reflects that the Employer employs about 77 employees, including about 55 to 57 laborers, 4 general foremen, 9 foremen, 1 mechanic, 1 mechanic's assistant and 3 office clerks. The parties stipulated, and I find, that the office clerks are office clerical employees and should be excluded from the unit. The parties further stipulated, and I find, that the

Employer's owners, Mark Hemington and his wife, who is the Employer's chief financial officer, are statutory supervisors who should be excluded from the unit.

At the time of the hearing, the Employer's workforce consisted of 12 crews of employees working at 12 job sites located in Roseville, Elk Grove, Davis, Cameron Park, Folsom and Rocklin, California. All of these job sites are located within a 30 to 40 mile radius of Sacramento, California. Each crew is comprised of between 3 and 25 employees with the average number of employees on a crew being about 7 or 8 employees. The crews work on a job from about a week to six months, depending on the work to be performed.

The Employer's President Mark Hemington identified the following four individuals as general foremen: Jorge Lopez, Juan Ramon Lopez, Filiberto Samaniego and Dale E. Schumacher. Jorge Lopez has been a general foreman for about 2 years; Juan Ramon Lopez and Samaniego have been general foremen about 3 years; and Dale Schumacher has been a general foreman for about 6 years. According to Hemington, each of the general foremen was a foreman prior to becoming a general foreman. However, Hemington testified that the promotion from foreman to general foreman was not accompanied by a pay increase and there was no paperwork documenting the promotions.

Hemington testified that he has never told the foremen and general foremen that they have those job titles and has never discussed with them their level of authority vis-à-vis other employees. According to Hemington, the Employer's payroll record does not identify the employees at issue as foremen or general foremen and the Employer has no written job description for these positions. Although the record reflects that the Employer has a safety manual that is used by all employees, this document was not introduced into the record and there is no evidence as to whether this document contains any references to the job titles of foreman or general foreman.

Hemington identified Emilio Aguilar, Louis Soto Aguero, Nicomedes Hernandez, Alfredo Mariscal, Jose Morales, Jesus Beas Palacio, Fausto Rodriguez, Bonifacio Roque and Jesus Reynaga Villanueva as foremen. Jose Morales has been a foreman about 18 months; Rodriguez about 5 years; Roque about 5 or 6 years; and Villanueva about 7 years.

The record discloses that most of the Employer's laborers, foremen and general foremen speak Spanish as their native language. While all of the general foremen speak English, only 4 of the 9 foremen do so.

Hemington testified that each crew of approximately 7 to 8 laborers is headed by a general foreman or a foreman who is responsible for the work of the crew at the job site. According to Hemington, the only difference between the foremen and general foremen is their level of experience and qualifications. Thus, the general foremen are capable of handling larger and more complex work projects than are the foremen. Generally, both the foremen and general foremen work with a single crew at a single job site at one time and none of them oversee multiple job sites simultaneously. However, Hemington testified that at the time of the hearing, General Foremen Dale Schumacher and Juan Ramon Lopez were working on

multiple job sites and that this was unusual. Schumacher was working on two job sites, only one of which had any employees working at it. Hemington could not recall any instance where Schumacher had actually overseen crews working simultaneously at multiple job sites. According to Hemington, at the time of the hearing, Lopez was working on four projects simultaneously. All of these projects were located within close proximity to each other and all involved the landscaping of street medians and doing finishing work on a completed project.

Hemington testified that he visits each job site once a week for about 15 minutes, that all of the foremen and general foremen carry cellular phones and that he (Hemington) is in telephonic contact with each foreman and general foreman on a daily basis to discuss what their respective crews are supposed to be doing.

Hiring. Hemington hires all of the Employer's employees and is the only person who conducts hiring interviews. Hemington testified that if a foreman or general foreman recommends an employee for hire, he would hire that individual without conducting an interview. According to Hemington, most of the foremen and general foremen have made hiring recommendations, including foreman Emilio Aguilar, who had requested that his brother come work for the Employer and his brother was hired. According to Hemington, Aguilar had recommended that a number of his brothers and cousins be hired and that he (Hemington) had hired them without interviews.

Hemington further testified that General Foreman Juan Ramon Lopez had recommended that his brother be hired at a rate of pay higher than the usual starting rate, (i.e., \$7 rather than \$6 an hour), and that he (Hemington) had hired Lopez's brother at the \$7 an hour rate without conducting an interview. In this regard, Hemington further testified that Lopez had reported that his brother needed \$7 an hour in order to work for the Employer.

According to Hemington, Filiberto Samaniego hired 3 new employees (Tomas Aubandis, Juan Oliveras Lopez and Alejandro Lopez) while heading a job in Sacramento in 1996-97. However, Samaniego, testified that on this occasion it had started to rain, the two laborers who had been working at the job site had left for Mexico, and he (Samaniego) was the only one left working on the project, which needed to be completed. Hemington told Samaniego he needed to find new Mexican workers, Samaniego did so, and Hemington approved their hire.

Hemington testified that he would also hire a laborer recommended by another laborer without conducting an interview if the person making the recommendation has enough experience. Thus, he testified that he would hire someone that Laborer Jesus Balthazar recommended without conducting an interview, and that he had hired employees recommended by other laborers without conducting interviews. Hemington testified that he has interviewed only about 2% of the 55 to 56 laborers.

According to Samaniego, about 90% of the employees are hired as a result of recommendations from other laborers, and most of the laborers come from the same part of Mexico and are relatives of those already employed by the Employer.

Scheduling and Work Assignments. With the exception of five employees who live in the Sacramento area, all of the Employer's laborers, foremen and general foremen report to the Employer's office in Cameron each morning at 6 a.m. or 6:30 a.m. Hemington is in the office by 6:30 a.m. and Mechanic Ken Arwood is in the office by 6 a.m. If an employee is to be absent from work, he or she is required to notify Hemington or Arwood. According to Hemington, Arwood has no responsibility with regard to absences other than to inform Hemington.

Hemington dispatches and assigns employees to the various crews using a magnetic assignment board that is located in the office. He usually makes these assignments the night before the work is to be done. The assignment board shows the names of everyone with the foreman or general foreman and the truck they are assigned to take to the job site. Each day, the foreman or general foreman drives the crew to the job site.

According to Hemington, the foremen and general foremen can request the number of employees and/or for particular employees to be assigned to their crews. He testified that he considers these requests in determining the composition of each crew based on "need." General Foreman Filiberto Samaniego testified that he has requested that Hemington put a certain number of employees on his crew but that Hemington does not automatically grant such a request. Rather, Hemington decides the number of employees to be assigned to a crew based on the needs of all of the jobs. With regard to the work done at the job sites, Hemington testified that generally the foremen and general foremen talk to him each day about what they're supposed to do. As noted above, the foremen and general foremen carry cellular phones provided by the Employer. The record discloses that the project superintendent on the various job sites (who are not employed by the Employer) also communicate with the foremen and general foremen directly about the work to be done at the site as well as call Hemington.

Timesheets. Each employee fills out his or her own timesheets. Hemington testified that the foremen and general foremen verify the accuracy of the time sheets of other employees. However, General Foreman Samaniego testified that he has no responsibility for ensuring that time sheets are filled out accurately and that his only responsibility is to inform Mechanic Arwood about who has reported and not reported for work on his crew.

Hemington testified generally that if employees on a crew want time off, they take the matter to the general foreman or the foreman at the job site. However, the record does not disclose how decisions involving vacation or other time off are actually handled other than with regard to references made in the agenda of the Employer's February 27, 1999 meeting with foremen and general foremen as described below.

With regard to overtime, Hemington testified that employees are paid time and a half for work on Saturdays. In this regard, he testified that weekend work is voluntary and that he relies on the recommendation of the foremen and general foremen as to whether weekend work is needed and as to how many employees are necessary. According to Hemington, the foremen and general foremen notify him in advance of the need to work on the weekend and he generally trusts their opinions in this regard. However, General Foreman Samaniego testified that Hemington does not consult with him about overtime and that the decision as to whether overtime weekend work is needed is made by the project superintendent on the job site. According to Samaniego, on a daily basis, the project superintendent communicates the need for overtime work through the foreman or general foreman and sometimes it is done by direct communication between the project superintendent and Mark Hemington. According to Samaniego, when weekend work is required, he asks for volunteers from the crew and that is how the composition of the crew is determined.

Dealing with Customers. Hemington testified that the general foremen and/or foremen can negotiate changes in the price of work to be done with the Employer's customers at the job site. However, Hemington could not recall any example or instance where this had occurred.

Ordering Supplies. Hemington testified that prior to the commencement of a job, he orders the supplies to be used. After the job has started, the foremen and general foremen call him each night and report what is needed and he orders it. Depending on the amount of supplies involved, they are either delivered the same day to the Employer's office or they are delivered to the job site the following day. Hemington testified that he relies on the foremen and general foremen to tell him what is needed. Similarly, Samaniego testified that when supplies are needed, he makes a list and submits it to the office or informs Hemington.

The Daily Work of the Foremen and General Foremen. The Employer has several pieces of equipment, including 7 Bobcats, one Ford loader/scrapper, one case trencher, and one Koboda garden tractor used by the Employer as a roto-tiller. Hemington testified that all of the Employer's equipment is in use most of the time and all of the general foremen can operate every piece of equipment. With regard to the loader scrapper, most of the foremen can operate it. Of the 55 to 57 laborers, only Jesus Balthazar and Jesus Valez Perez can operate the loader scrapper. With regard to the Bobcats, all of the foremen can operate them and only about 10 of the laborers can operate them. With regard to the case trencher, all the foremen and general foremen can operate it and only one laborer (Sylvester Padilla) can operate it; with regard to the Koboda garden tractor, foremen Nicomedes, Jesus Beas Palacio and Jesus Reynaga Villanueva can operate it and only 3 of the laborers can operate it (e.g., Jesus Balthazar, Jesus Valdez Perez and Rafael Reynaga Villanueva).

Hemington testified that he did not know how much time the general foremen or foremen spend operating the above-described equipment or otherwise working with the tools of the trade. However, General Foreman Samaniego testified that on an average day, he spends 7 hours running the Bobcat, 1 hour doing blueprints and 1 hour checking on supplies. The record does not disclose how much time the other foremen or general foremen spend operating such equipment or otherwise doing laborers' work.

According to Hemington, certain of the more experienced laborers can cut and glue pipe but the Employer does not have a separate classification of pipe fitter.

Disciplining of Employees. With regard to disciplining employees, the record reflects that none of the foremen or general foremen has ever suspended or written up an employee. The foremen and general foremen verbally correct employees' work while on the job. General Foreman Samaniego testified that while he was working on a job in Reno, Nevada, he had telephoned Hemington to discuss the use of the telephone at the house where the employees were staying. Samaniego did not recommend that any employee be disciplined on this occasion but asked only if it was appropriate for the employee to be using the phone. Samaniego testified that he had no knowledge as to whether the employee involved in this incident was ever disciplined as a result of this conversation.

Hemington testified that only General Foreman Schumacher has ever been involved in the termination of an employee. In this regard, Hemington testified that in October 1998, while Schumacher was heading a crew of employees at the John Kemp Community College Park job site in Folsom, California, he terminated employee Miguel Aubandis for insubordination.

According to Hemington, Schumacher had previously notified Hemington on two occasions that he was having trouble getting Aubandis to follow orders. Hemington asked if Schumacher wanted Hemington to handle the matter, and Schumacher said he would try to take care of it himself. When Hemington visited the job site on a subsequent occasion, Schumacher informed him that things were going "okay" with Aubandis. On the day of the termination, Schumacher telephoned Hemington and informed him that he had asked Aubandis to do something and Aubandis had told him to "Go f--- himself" and Schumacher had directed Aubandis to "go home." Hemington testified that he supported Schumacher's decision to send Aubandis home, and Aubandis was terminated. The record contains no documentation regarding this termination. According to Hemington, the only documentation ever made by the Employer when a termination occurs is a notation on the time sheet and a note in the employee's personnel file. These notes do not, however, include the basis for the termination.

Hemington testified that there had been about 3 terminations in the 2 years prior to the hearing in this case. The record does not disclose the circumstances involved in the other 2 terminations.

Transfers of Employees to Other Crews. Hemington testified that most of the foremen and general foremen have asked that employees be transferred from their crews. When this occurs, Hemington asks the foreman or general foreman which laborer they would like to replace the person to be transferred and he usually tries to accommodate the request.

In 1997, General Foreman Schumacher telephoned Hemington and asked that a laborer named Vincente be transferred to another crew. Schumacher explained that Vincente was blowing dust in the other workers' faces and when Schumacher told him to stop he had

laughed. Hemington transferred Vincente to the Employer's mowing crew, which consists of 3 laborers who are directly supervised by Hemington.

Hemington further testified that in October 1998, Foreman Emelio Aguilar requested that Juan Ortega be transferred from his crew because Ortega was "lazy and doesn't like to work with me." Hemington testified that he transferred Ortega to another crew. This was the only occasion where Ortega requested such a transfer according to Hemington.

In July 1998, Foreman Jose Morales told Hemington that Vincente was not following orders and was saying that Morales was not his boss. Hemington testified that he told Morales to talk to Vincente and straighten the situation out; if it was worked out, Vincente could stay on his crew but otherwise Hemington was going to transfer Vincente to another crew. About a week later, Morales came to Hemington and told him that Vincente wanted to "change with another person." Hemington thereupon transferred Vincente to another crew.

In 1997, General Foreman Juan Ramon Lopez asked Hemington to transfer his uncle to another crew because he was having difficulty having his uncle work for and take orders from him. Hemington transferred Lopez's uncle to another crew the next day.

Hemington testified that General Foreman Samaniego and Foremen Luis Soto Aguero, Jesus Beas Palacio and Bonifacio Roque had never spoken to him about transferring anyone from their crews.

Layoffs and Recalls of Employees. Hemington testified that the Employer's work fluctuates with the season and that generally there are fewer jobs during the rainy winter months. Samaniego likewise testified that some employees are laid off in the winter and go to Mexico. According to Hemington, during the winter, the foremen typically do not work for the Employer and are self-employed. He testified that he generally asks the view of the foremen and general foremen as to who should be laid off. However, General Foreman Samaniego testified that Hemington has never consulted him about who to lay off and who to recall. According to Samaniego, if there is still work after the rainy season begins, Hemington asks the laborers who wants to stay in the United States and continue working, and the laborers decide among themselves who will remain.

In April 1999, Hemington laid off 14 laborers because of lack of work when 6 jobs were ending at the same time. According to Hemington, he decided to lay off the employees based on cost and informed the employees by taking their names off the magnetic assignment board.

Meeting With Foremen and General Foremen. On February 27, 1999, prior to the hearing in the instant case, the Employer had its first and only meeting with its foremen and general foremen. No laborer employees were present. The record contains a copy of the agenda for this meeting. Among the items listed on the agenda are admonitions to the foremen and general foremen to use the phones to talk and "tell me what is going on." Further, it states that they are responsible for materials delivered to the job site and that they should check the

quantity and quality of the materials and plants received and turn in their receipts on a daily basis. They are also responsible for notifying the mechanic if there is a problem with a vehicle. With regard to vacation, it states as follows:

- (1) Notice. In writing with a minimum of 1 month notice. Planning.
- (2) Length of vacation. Two weeks.

The agenda also states that the foremen and general foremen should teach and train other employees.

Evaluation of Employees. The record reflects that the Employer does not have any written/formal appraisal system. However, Hemington testified that he gives employees verbal appraisals, and the foremen and general foremen have input by telling him how employees are doing on the job. According to Hemington, he decides the wage rates of all employees.

Wage Rates and Benefits. All employees are hourly paid. The general foremen receive \$13 to \$18.50 an hour; the foremen receive \$10.50 to \$13 an hour; the laborers receive \$6 to \$10.00 an hour; the mechanic receives \$15 an hour; and the mechanic's helper receives \$10 an hour. Hemington testified that laborer Jesus Balthazar earns a rate of pay higher than most of the other laborers (\$10 an hour) because of his ability to operate equipment. The record reflects that Schumacher is the highest paid employee at \$18.50 an hour. Hemington testified, however, Schumacher's job duties are the same as those of the other general foremen.

The record reflects that all employees employed by the Employer work the same number of hours a day and all are eligible to earn overtime. However, the benefits of the various groups of employees vary in that laborers do not receive paid sick leave or vacation leave while foremen, general foremen and the mechanic get a week of paid sick or vacation leave each year. All employees are eligible to receive bonuses based on Hemington's discretion. All are invited to Employer social events such as picnics. In 1997, the Employer took all of those employed to Great America.

The foremen and general foremen wear the same type of clothing as other employees at the various job sites. As indicated above, they also carry cellular phones that are used to keep in contact with Hemington.

Mechanic. The Employer employs one mechanic, Ken Arwood, who is responsible for the upkeep of all of the Employer's equipment. While Arwood generally works in the Employer's shop, he also goes out to job sites to repair equipment or trucks that break down at the site. Arwood starts work at 6 a.m., and, if employees are not going to be at work, they call Arwood and inform him if Hemington has not yet arrived at work. Hemington testified that otherwise, Arwood has no responsibility with respect to the attendance of employees. As discussed below, Hemington further testified that he, not Arwood, supervises the mechanic's helper, Dale Kast. Arwood earns \$15 an hour.

Mechanic's Helper. The Employer employs one mechanic's helper named Dale Kast who assists mechanic Ken Arwood. Kast picks up parts and plans and goes to completed job sites to check the irrigation controller to ensure the system is working. Kast reports directly to Hemington, who gives him assignments and checks on his work.

Analysis. As stated above, the Employer contends that all of its foremen and general foremen are statutory supervisors who should be excluded from the unit while the Joint Petitioners contend that with the exception of General Foreman Dale E. Schumacher who it asserts is a statutory supervisor, all of the foremen and general foremen should be included in the unit.

The term "supervisor" is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances. or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet this definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively recommend, so long as the performance of that function is not routine but requires the use of independent judgment." Nymed, Inc., d/b/a Ten Broeck Commons, 320 NLRB 806, 809 (1996).

As observed by the Board in Providence Hospital, 320 NLRB 717, 725 (1996):

In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with "genuine management prerogatives," and "straw bosses, lead men, and set-up men" who are protected by the Act even though they perform "minor supervisory duties." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974).

An employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will effect employees' job status. Ohio Masonic Home, 295 NLRB 390, 393 (1989).

Whether an individual is a statutory supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See Phillips v. Kennedy, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires

“evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority.” Oil Workers v. NLRB, 445 F.2d 237, 243 (D.C. Cir. 1971).

The burden of proving supervisory status rests on the party asserting that such status exists. Tucson Gas & Electric Co., 241 NLRB 181 (1979); Coors distributing Company of San Jose, Inc. d/b/a California Beverage Company, 283 NLRB No. 52 (1987). In enacting Section 2(11), Congress emphasized its intention that only those persons vested with “genuine management prerogative” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” Chicago Metallic Corporation, 273 NLRB 1677, 1688 (1985). Thus, when making a determination regarding supervisory status, “the Board has a duty to employees to be alert and not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.” Chicago Metallic Corp., supra at 1689.

Applying the foregoing factors to the instant case, I find that the evidence does not support a finding that any of the Employer’s foremen or general foremen is a statutory supervisor. The record reflects that the Employer has never informed any of its foremen or general foreman that they hold these positions or that they possess any authority which would be considered supervisory under the Act. Rather, the record discloses that the foremen and general foremen are generally the most experienced and skilled workers of the Employer, not only in terms of number of years employed but also with regard to their ability to operate the Employer’s equipment. The foremen and general foremen work the same hours as the laborers and they drive the laborers to and from the Employer’s facility and the various job sites. As shown by Samaniego’s testimony, the foremen and general foremen spend most of their work time operating equipment inasmuch as most of the Employer’s laborers lack the ability to operate the equipment.

With regard to the hiring of employees, the record does not establish that the foremen or general foremen hire or effectively recommend hiring for the Employer. The fact that they recommend family members or friends that the Employer hires without conducting an interview does not make them statutory supervisors, particularly given that the Employer also hires persons recommended by experienced laborers, such as Jesus Balthazar, without interviews. Thus, it appears from the record that the Employer is hiring employees based on its willingness to rely on the experience level of the person making the recommendation and perhaps the family or friendship tie involved and not because of any supervisory authority possessed by the person making the recommendation. In this regard, General Foreman Samaniego’s testimony is notable that 90% of the Employer’s work force was hired as a result of recommendations made by laborer employees and that most of the employees come from the same area of Mexico.

With regard to scheduling and the assignment of work, the record shows that the foremen and general foremen do not determine the size or composition of their crews or determine which crew will work at which job site. Hemington makes all of these determinations. While the foremen and general foremen may request a specific number of employees or request particular employees by name, it is Hemington who ultimately makes the determination. In doing so, Hemington does not automatically grant the requests of the individual foremen or general foremen in this regard. Rather, he determines the sizes of the crews and their composition based on the needs at all of the various job sites. It also appears from the record that the number of employees assigned to a crew is also influenced by the input of the superintendent of the project where the crew is working. The record likewise discloses that while the foremen and general foremen may communicate requests for the superintendent for weekend work to Hemington, it is Hemington who decides in advance whether weekend/overtime work will be allowed. Foremen and general foremen then request volunteers to work such hours. I do not find that such responsibilities are sufficient to make them statutory supervisors.

With regard to disciplining employees, there is no evidence that any foremen or general foremen has ever suspended or written up an employee. While they may correct and verbally admonish employees, they have taken no further actions except with regard to the example offered by the Employer involving General Foreman Schumacher. Thus, the record discloses that in October, 1998, General Foreman Schumacher told an employee who had been insubordinate "to go home." However, on two occasions prior to this incident, Schumacher had conferred with Hemington about insubordination problems with this employee. Hemington had asked if Schumacher wanted Hemington to handle the matter, and Schumacher had said he would handle it. On the day Schumacher sent this employee home, the employee used profanity with Schumacher and refused to follow Schumacher's directions. Schumacher told the employee to go home and then he called Hemington and told him what happened. Hemington supported Schumacher in his decision, and the employee was terminated. The record contains no documentation regarding this termination. Thus, it is unclear from the record whether Schumacher's sending the employee home constituted the termination or whether Hemington's approval of Schumacher's action was necessary to effectuate the termination. In this regard, there is no evidence that the Employer has ever informed Schumacher that he possesses the authority to terminate employees. In any event, this single isolated instance of an action, which might otherwise be indicative of supervisory authority, is insufficient to predicate a finding that Schumacher is a statutory supervisor.

Commercial Fleet Wash, 190 NLRB 326 (1971)

The record discloses four instances where Hemington has transferred laborers from a crew at the request of foremen or general foremen. As shown above, one of these instances involved a request that a family member be moved to another crew. In

another instance, the employee asked to be transferred. In each instance, Hemington made the decision to transfer and where to transfer the employee. He also determined who should be transferred back to the crew to replace the missing worker. At least 3 of the foremen and one of the general foremen have never been involved in making a transfer request to Hemington. I do not find that such instances of requesting transfers are sufficient to warrant a finding that the general foremen or foremen are supervisors. Thus, it is Hemington who ultimately decides that such transfers will occur after the foremen or general foreman report a problem to him. J.C. Brock Corp., 314 NLRB 157, 159 (1994).

With regard to the direction of the work of the crew at the job sites by the foremen and general foremen, the work performed by the crews appears to be of a routine, repetitive and relatively unskilled nature. There is no evidence that the direction of such work by the foremen and general foremen requires the exercise of any independent judgement. See Wilson Tree Company, Inc., 312 NLRB 883, 893 (1993); NLRB v. Dickerson-Chapman, Inc., 964 F.2d 493 (5th Cir. 1992), enf'g 301 NLRB 267 (1991). Further, the foremen and general foremen are in daily contact with Hemington by cellular telephone with regard to the work to be performed and Hemington visits the job sites on a regular basis. In addition, the project superintendents on the sites provide oversight of the work of the crew.

Although the record reflects that the foremen and general foremen verify the laborers' timesheets, such responsibility does not establish their status as statutory supervisors. J. C. Brock Corp., supra.

All of the foremen and general foremen, including General Foreman Schumacher, are hourly paid as are all other employees of the Employer. The fact that the foremen and general foremen receive a higher hourly wage than the laborers and benefits that the laborers do not receive (i.e. a week's paid vacation or sick leave) does not warrant the conclusion that they are statutory supervisors. Rather, their higher wage rate is consistent with their greater experience level; years with the Employer; ability to run various pieces of equipment used by the Employer; and their additional tasks and administrative responsibilities (i.e., driving employees to the job sites; being responsible for reporting problems with company vehicles and equipment; reporting supplies that need to be ordered; and verifying attendance. Thus, I find that the record evidence does not establish that the foremen and general foremen, including General Foreman Schumacher, are statutory supervisors.

In reaching this conclusion, I have considered the argument raised by the Employer that if the foremen and general foremen are not statutory supervisors, there would be only one supervisor (Mark Hemington) for 77 employees at numerous work sites over a large geographic area and that this ratio of employees to supervisors is too

high. However, the determination that individuals are statutory supervisors must be based on evidence of actual supervisory authority of the individuals at issue and not only on ratios of supervisors to non-supervisors. See J. Brock Corp., *supra*, at 159. As noted above, the record herein does not support a finding that the foremen and general foremen are statutory supervisors based on the criteria set forth in Section 2(11) of the Act. Thus, the record reflects that it is Hemington who makes all decisions involving the hiring, firing, scheduling, disciplining, transferring and layoff of employees and there is no record evidence that the foremen or general foremen make effective recommendations in these areas.

The Employer argues that it is “absurd” to believe that a company the size of the Employer could operate with Hemington as its only statutory supervisor. However, it is noted that the record discloses several factors, which enable the Employer to operate in its current manner. First, virtually all employees report to the Employer’s office every day and are dispatched by Hemington from the office. They return to the office each night. Hemington is in daily contact by cellular phone with his foremen and general foremen at the job sites. The foremen and general foremen, including General Foreman Schumacher, are highly experienced and skilled lead persons who can work with a crew. The work being performed by the crew is manual labor that is repetitive in nature. Thus, even if the foremen and general foremen direct the work of the crews at the job sites, there is no showing that such direction requires the exercise of independent judgement. Further, the work of the crews is not only guided by Hemington’s direction through daily telephonic contact and by his regular visits to the job sites, it is also guided by the project superintendents at the various job sites who have daily contact with the foreman and general foremen. See First Western Building Services, Inc., 309 NLRB 591, 603 (1992).

In these circumstances, find that the record evidence does not establish that the Employer’s foremen or general foremen, including General Foreman Schumacher, are statutory supervisors. Accordingly, they will be included in the unit.

The Mechanic. With regard to the mechanic, I find that that is no evidence in the record to establish that he possesses or exercises statutory supervisory authority or makes effective recommendations in this regard. Thus, like the foremen and general foremen, there is no record evidence that the mechanic possesses or has exercised the authority to hire, fire, schedule, discipline, transfer, layoff, recall or promote employees. Like the foremen and general foremen, the mechanic is hourly paid and his rate of pay and benefits are similar to those of the foremen and general foremen. Although he works at the shop at the Employer’s office, the mechanic also visits the various job sites where the Employer’s crews work in order to repair the equipment and vehicles used by the Employer’s crews. Accordingly, the mechanic will be included in the unit.

6/ In their post-hearing brief, the Joint Petitioners contend that formula enunciated in Daniel Construction Company, Inc., 133 NLRB 264 (1961) should be used to determine the eligibility of those persons who will vote in the election directed herein and that there is no dispute between the parties over the application of the Daniel formula in this case. However, the record reflects that although the parties stipulated that the Employer is a landscaping contractor “in the construction industry,” there was no agreement between the parties that the Employer is a construction industry employer. Moreover, there was no discussion between the parties on the record regarding the use of the Daniel formula. In these circumstances, I decline to use the Daniel formula.

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